IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 164 OF 1987

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge and the Appellate Judge?

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KHARVA KALU NATHU - Appellant(s)
Versus
NARAN BHAVAN VADHIA - Respondent(s)

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Appearance :
Shri N.D. Buch for Appellant(s).
None for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 21/03/2007

ORAL JUDGMENT

The parties are heard.

2. The plaintiff happened to be a tenant of the Trust and was

possessed of certain properties, which included constructed area and some open areas. An adjoining house also belonged to the same Trust, the said Trust sold the adjoining house to the defendant on 11th August, 1980. The defendant thereafter made an application to the Municipal Council, Porbandar for grant of permission to raise the construction; on 2nd December, 1980, such permission was accorded and the plaintiff was permitted to raise certain construction, including gallery, bath-room, staircase and compound wall on the ground floor, so also a room with roof on the first floor. On 29th July, 1982, that is, within two years from the date of accord of the permission, the plaintiff-respondent filed the suit submitting, *inter alia*, that the defendant had raised the construction in a manner which would adversely affect his right of way, light and air. The wall has virtually led to closure of the two ventilators which were in existence for more than 35 years and by raising the wall, the right of way was also adversely affected. He prayed for a decree for declaration and mandatory injunction.

The defendant appeared before the Court and raised number of pleadings, including the question of limitation, etc. The learned trial Court, after recording the evidence and hearing the parties, dismissed the suit, but, the learned Appellate Court held that the plaintiff was successful in proving the existence and use of the ventilators for more than 35 years; relying upon the statement of the trustees, the Court held that the property, as it was, in existence for more than 35 years, it also held that the defendant could not prove the agreement alleged to be entered into between the parties whereunder the permission allegedly was granted by the plaintiff to the defendant; it also held that the suit was not barred by limitation, that the plaintiff has proved acquiring of the right by prescription and that the plaintiff was successful in proving his pleadings. Being aggrieved by the order of demolition and removal of

construction, the defendant is before this Court.

3. The appeal has been admitted for hearing the parties on the following substantial questions of law:

"*(1) Whether the suit is barred by Limitation Act?*

(2) Whether the plaintiff has waived his right as contended in para 6 of the Written Statement or not?

(3) Whether the plaintiff had easementary right by way of prescription and necessary from the western wall windows and right of way from Chhitri or not?

(4) In the facts and circumstances of the case, whether the Appellate Court erred in ordering the defendant to remove construction instead of awarding damages?"

4. On being asked that if the suit has been filed within a period of two years from the date of grant of the permission in favour of the defendant, how would the suit be barred by limitation, the learned Counsel for the appellant, though submitted that the suit was barred by limitation, but, was unable to say that why it was so. From the facts narrated above, it would clearly appear that the permission to construct was granted on 2nd December, 1980 and the suit came to be filed on 29th July, 1982. The suit was filed within two years from the date of the permission. It is not the case of the defendant that much before the permission, he raised the construction. If that be so, the suit cannot be held to be barred by limitation.

5. So far as Question No.2 is concerned, the burden was upon the defendant to prove that the plaintiff had waived the right in view of the allegations made in paragraph 6 of the written statement. The Court

below has found that the defendant has miserably failed in proving the existence of the agreement. If the defendant was relying upon some oral agreement, then, he was required to prove the same by leading clinching and cogent evidence. Unfortunately, he failed and if that be so, it cannot be held that the plaintiff had waived his right.

6. So far as Question No.3 is concerned, I must immediately hold that in view of the findings recorded by the learned first Appellate Court that the plaintiff was using the land under the right of way and was also having light and air and had perfected his right by prescription, all such findings would be the finding of facts. Simply because another view is possible, it would not be proper for the High Court to make reassessment of the entire evidence. The findings recorded by the learned first Appellate Court cannot be said to be bad or perverse. The findings have been arrived at by the learned first Appellate Court after due appreciation of the evidence. The said findings deserve to and are, accordingly, confirmed and it is held that the plaintiff has acquired the rights by prescription.

7. So far as Question No.4 is concerned, in view of the answers to the above three questions, the question must be decided against the interest of the defendant. In a given case, instead of directing removal of the construction, the Court may award damages. Unfortunately, present is not a case of that type. In the present matter, the defendant had made encroachment upon some land belonging to the plaintiff, he entered in the house of the plaintiff, raised the construction without any authority of law and thereafter, raised a wall which led to closure of two ventilators from which, undisputedly, the plaintiff was getting light and air and the kitchen's smoke etc. use to come out. Present would not be a case for awarding of compensation, but, would be a case for directing

demolition of the illegal construction.

8. The learned first Appellate Court was absolutely justified in decreeing the suit.

9. I find no reason to interfere. All the questions are answered against the interest of the appellant-defendant. The appeal deserves to and is, accordingly, dismissed. No costs. Let a decree be framed accordingly.

[R.S.Garg, J.]

*kamlesh**